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Situation of human rights in the Palestinian territories occupied since 1967

Note by the Secretary-General**

The Secretary-General has the honour to transmit to the members of the General Assembly the report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967, Richard Falk, submitted in accordance with Human Rights Council resolution 5/1.

* A/64/150.

** This report was submitted after the deadline so as to include the most recent developments.

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Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied by Israel since 1967

Summary

The present report examines the observance of international humanitarian and international human rights standards in the Palestinian territories occupied by Israel since 1967 during the period from December 2008 to July 2009. The report takes note of the continuing unlawful non-cooperation of the Government of Israel with the mandate holder. It pays particular attention to the Gaza Strip after the Israeli military operation "Operation Cast Lead", noting the continuation of the blockade that jeopardizes fundamental human rights, hinders reconstruction and repair of vital civilian infrastructure.

The report reviews alleged war crimes committed during Operation Cast Lead and the issue of accountability. It considers available information regarding attacks on United Nations facilities and the civilian population and provides an analysis of their legal merit. The report comments on the testimony of combat soldiers who took part in Operation Cast Lead, which gives evidence of consistent reliance on loose rules of engagement and widespread destruction of targets that could not be justified from a military or security perspective.

The report discusses the issue of Israeli settlements, noting that recent discussions of a freeze on settlements have been made as political steps and not with reference to Palestinian rights under international humanitarian law. Finally, the report discusses the issue of the continued construction of a wall in the occupied Palestinian territories and Israeli non-compliance with the 2004 advisory opinion of the International Court of Justice, which it considers to be damaging to international law, to the International Court of Justice and to the United Nations generally.

The report ends with recommendations that the General Assembly should request an advisory opinion from the International Court of Justice on the obligations and duties of Member States to cooperate with the Organization and its representatives; that Members of the United Nations should be encouraged to use national means, including courts, with respect to implementing international criminal law as pertains to the occupied Palestinian Territory; that Israeli respect for international law and Palestinian rights should henceforth be an integral element in future peace negotiations; and that consideration should be given to imposing limits on the supply of arms to the parties to the Israel-Palestine conflict.

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I. Introduction

1. The Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967 was appointed in accordance with resolution 1993/2 A of the Commission on Human Rights, on 26 March 2008, and took up his position on 1 May 2008. Richard Falk as Special Rapporteur holder of the mandate was expelled from Israel on 14 December 2008, and despite repeated formal efforts to discuss future visits to the occupied Palestinian Territory (oPt), Israel has ignored all such approaches without providing any explanation.

2. His report takes particular note of the continuing unlawful non-cooperation of Israel with the work of the mandate holder. Along similar lines it has denied entry and cooperation with the Human Rights Council fact-finding mission on the Gaza conflict headed by Judge Richard Goldstone. As suggested in earlier reports this non-cooperative behaviour is setting an unfortunate precedent for Human Rights Council/United Nations relations with Member States, as well as interfering with the work of the mandate. As earlier, it is recommended that the General Assembly or the Human Rights Council request clarification of the legal consequences of this non-cooperative behaviour by referring the issue to the International Court of Justice for an advisory opinion. As a result of the inability of the Special Rapporteur to carry out site visits, this report relies heavily on the work of others, especially a variety of independent and reliable human rights non-governmental organizations and the work of various actors within the United Nations System.

3. The report covers developments taking place primarily from December 2008 to July 2009 and several issues will be addressed in detail, mainly the Gaza crisis, the accountability gap, the advisory opinion rendered by the International Court of Justice on 9 July 2004 on construction of a security wall by Israel,[1] settlement expansion, Palestinian self-determination and gaps in international humanitarian law. The following sections provide a brief overview of each of these issues.

4. On the Gaza crisis, although the ceasefire established by the parties on 18 January 2009 has generally held, the overall situation is that Gaza has continued to deteriorate in a manner that discloses patterns of grave breaches of the Fourth Geneva Convention and violations of international human rights law which have implications under international criminal law. Due to the persistence of the blockade of the Gaza Strip, insufficient basic necessities are reaching the population; health conditions have further worsened putting all Gazans at risk; building materials needed for the repair and reconstruction of homes and buildings destroyed by the Israeli Defense Forces during the 22-day Gaza War have been disallowed entry. The United Nations System is challenged on an emergency basis to take some tangible action to render protection to the civilian population of Gaza.

5. On accountability, there have by now been several authoritative reports with convergent and mutually reinforcing confirmation of war crimes allegations.[2] It will be important to add to this available information the report of the fact-finding mission headed by Judge Goldstone, due 12 September 2009, but it is not too early to wonder about the follow-up, which means seeking mechanisms to impose

[1] See A/ES-10/273 and Corr.1; see also *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, ICJ Report 2004*, p. 136, and General Assembly resolution ES-10/15.

[2] See para. 24 below.

accountability and avoid impunity. A recent decision by the British Government to cancel contracts for the delivery of spare parts to the Israeli navy was based on objections to the manner in which Israel has conducted recent military operations. It is notable that Amnesty International called for a complete arms embargo on both Israel and Hamas in light of its conclusions discussed above about the Israeli military operation in Gaza named Operation Cast Lead.

6. The fifth anniversary of the advisory opinion on the construction of a security wall by Israel[1] calls attention to several factors: (a) despite the near unanimity of the International Court of Justice (14 judges against one) that the wall as located on occupied Palestinian territory was unlawful and should be immediately dismantled, Israel has continued construction of the wall, now about two-thirds complete; (b) the defiance of a definitive ruling of the Court on international law is a serious violation by Israel of its obligations as a Member of the United Nations and as a sovereign State; even though embodied in an "advisory opinion", the decision of the Court represents an authoritative assessment of international law and was also accepted as authoritative by the General Assembly in its resolution ES-10/15 adopted on 20 July 2004; (c) the failure of the United Nations System to make more of an effort to implement such a clear and widely supported conclusion of international law is a further indication that Palestinian rights are not respected and that Israel enjoys a situation of de facto impunity; and (d) continued Palestinian non-violent demonstrations at wall construction sites have been met with excessive force by Israeli security forces resulting in several deaths and numerous casualties.[3]

7. On settlement expansion, despite many calls for a settlement freeze, including by United States President Obama, reports indicate that settlement expansion continues in both East Jerusalem and the West Bank. It has been made clear by the Palestinian Authority and the United States Government that any further progress on the "road map" depends on an unconditional Israeli freeze on settlement growth. It should be noted that such a freeze, even if agreed upon, does not deal with the underlying illegality of the settlements as set forth in article 49(6) of the Fourth Geneva Convention.

8. On Palestinian self-determination, the most fundamental international human right whose realization has been thwarted by Israeli occupation of Palestinian territories is the inalienable right of self-determination as enshrined in article 1 of both international human rights covenants. It has been widely assumed that the exercise of this Palestinian right would be brought about through bilateral negotiations, reinforced by the role of the United States, more recently by the Quartet (that has involved direct United Nations participation) and encouraged by the international community as a whole. Because the exercise of this right has been so long deferred and because the Palestinian situation under occupation endures multiple forms of unlawfulness, it is of utmost urgency to work towards a peaceful solution and an end to Israeli occupation.

9. It is relevant to this report, then, to take note of two sets of contradictory developments, some negative, others seemingly positive, bearing on the right of

[3] A number of 1,804 Palestinians were injured in anti-Barrier demonstrations between January 2005 and June 2009, which represents 31 per cent of all direct conflict injuries in the West Bank. See Office for the Coordination of Humanitarian Affairs, "Five Years after the International Court of Justice Advisory Opinion: A Summary of the Humanitarian Impact of the Barrier", July 2009. Available from www.ochaopt.org.

self-determination. The main negative development is the seeming unwillingness of the recently elected Israeli Government to endorse in clear terms the international consensus on a sovereign Palestinian State comprising the West Bank, Gaza, and East Jerusalem as its capital; the inability on the Palestinian side to achieve unified and legitimated representation that would seem to be a precondition for meaningful peace negotiations is another negative development.

10. This set of conditions has led in recent months to the advocacy of an imposed solution by external parties, often known as "the Solana Plan" because of the prominence accorded to proposals made along these lines by Javier Solana. At present, neither public opinion nor leaders in Israel or Palestine are favourable to an imposed solution, and its advocacy must be considered a negative development, inconsistent with the right of self-determination, and an expression of frustration arising from the seeming futility of direct negotiations.

11. The positive developments involve clear formulations of the importance of forward progress with respect to self-determination on the basis of an end to Israeli occupation and the establishment of Palestinian statehood. To this effect, President Obama stated on 4 June 2009 in Cairo: "the situation for the Palestinian people is intolerable, and America will not turn its back on the legitimate Palestinian aspiration for dignity, opportunity and a State of their own". Such positions were reiterated by the Security Council in its statement of 11 May 2009, and by the Quartet in its statement of 26 June 2009 in Trieste: It agreed "that Arab-Israeli peace and the establishment of a State of Palestine in the West Bank and Gaza in which the Palestinian people can determine their own destiny is in the fundamental interests of the international community".

12. As far as gaps in international humanitarian law are concerned, the prolonged occupation of Palestinian territories, as well as recent military operations by Israel, have revealed three gaps in the law that deserve to be noticed and closed as soon as possible: (a) the denial of a right by civilians to depart from a combat zone. This right was denied to all civilian inhabitants of Gaza during Operation Cast Lead with the exception of a few hundred Gazan residents with foreign passports and members of a small Christian community in Gaza.[4] There seems to be a variety of issues posed here about the occupiers' duty to protect the civilian population as most fully described in Additional Protocol I to the Geneva Conventions, which is binding because its norms are incorporated into customary international law despite Israel not being a party to this treaty;[5] (b) the denial of internationally donated reconstruction aid to repair war damage in Gaza due to maintenance of blockade in violation of article 33 of the Fourth Geneva Convention. This blockage of reconstruction aid could be treated as an instance of prohibited collective punishment, but because it raises a distinct set of post-combat issues that are not explicitly addressed by international humanitarian law it might be best handled by the adoption of a further protocol to the Geneva Conventions; and (c) as a specific result of prolonged occupation of the occupied Palestinian Territory, now in its forty-second year, coupled with restrictions on mobility imposed by the occupying power, anguishing family fragmentations have added to Palestinian suffering and seem unacceptable from the perspective of international human rights.

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[4] See Amnesty International "Israel and Gaza: Operation 'Cast Lead': 22 days of death and destruction", 2 July 2009. Available from www.amnesty.org/en/library/info/MDE15/015/2009/en.

[5] Ibid.; see also articles 51, 52 and 57 of Protocol I to the Geneva Conventions.

13. The Nobel Peace laureate, Mairead Maguire, a frequent visitor to Gaza and the West Bank, has recently written that there is rightly much talk about people and aid getting into Gaza but for her the greatest crime the Israeli Government commits is to cut the people of Gaza off from family and friends in the West Bank, and also from other Palestinians around the world. She noted that denying people the right to meet with their families and friends is surely one of the greatest forms of torture and collective punishment of civilians.[6] Of course, these statements are not declarative of existing legal rights but they call attention to a gap in the international humanitarian law protection of a civilian population subjected to prolonged occupation. In the Palestinian situation, with rights of entry and exit so strictly monitored, these restrictions impose particularly anguishing burdens. An additional dimension of prolonged occupation is the inability of Palestinian refugees living in foreign countries to maintain contact with their families over the course of more than four decades. This tragic gap in civilian protection associated with prolonged occupation seems completely unaddressed in the existing international humanitarian law framework.

II. Gaza after the ceasefire

14. The continuing crisis that confronts the entire civilian population of the Gaza Strip with unalleviated desperate circumstances arising from various unlawful features of the Israeli occupation is a challenge to the United Nations System and to the international community. To ignore this challenge is to send a powerful message that violations of international humanitarian law and international human rights standards do not matter, and that a state backed up by strong geopolitical support enjoys virtually unrestricted impunity.

A. The blockade

15. The International Committee of the Red Cross (ICRC) issued an important report entitled "Gaza: 1.5 Million People Trapped in Despair" on 1 July 2009. Taking note of the massive human and material devastation caused by the 22 days of Operation Cast Lead, the report writes: "Six months later [after the Cast Lead ceasefire], restrictions on imports are making it impossible for Gazans to rebuild their lives. The quantities of goods now entering Gaza fall well short of what is required to meet the population's need. In May 2009, only 2,662 truckloads of goods entered Gaza from Israel, a decrease of almost 80 per cent compared to the 11,392 truckloads allowed in during April 2007, before Hamas took over the territory".[7] According to estimates of Amnesty International, this is about one twentieth of the daily average of supplies entering Gaza before the blockade, although some estimates put the disparity at the one-fifth level.

16. ICRC report goes on to note that Gaza neighbourhoods destroyed by the military operation "will continue to look like the epicentre of a massive earthquake" unless "vast quantities"[7] of construction materials are allowed to enter both for rebuilding and to repair damage to the infrastructure. It is also claimed that as many

[6] See letter to Miguel d'Escoto-Brockmann, President of the General Assembly, 17 July 2009.

[7] See International Committee of the Red Cross, "Gaza: 1.5 Million People Trapped in Despair", July 2009.

as 340,000 Palestinians were displaced by Operation Cast Lead, and due to the blockade many of these remain homeless. The open letter to Carl Bildt[8] sent by the Palestinian Council of Human Rights Organizations also makes the following allegation: "patients, some of whom were injured as a direct result of 'Operation Cast Lead', are regularly denied permission to leave the Gaza Strip in order to seek critical medical treatment abroad, which has ultimately resulted in several deaths".

17. In the language of the ICRC report, "the only way to address this crisis is to lift restrictions on spare parts, water pipes, and building materials such as cement and steel [and glass] so that homes can be rebuilt and vital infrastructure maintained and upgraded".[7] As matters now stand, the maintenance of the blockade prevents reconstruction, keeps the vital water and sewage disposal system in unsafe condition, and extends the health crisis described in the prior report of the Special Rapporteur (A/63/326). The nearly $4.5 billion pledged in Egypt in March 2009, at the donor conference for reconstruction of Gaza has had virtually no impact on the life circumstances of Gaza and its population. Israel takes the position that only humanitarian goods will be allowed to enter Gaza, and that is strictly interpreted to mean subsistence needs, disallowing such foods as tomato paste, biscuits, and canned tuna, as well as a blanket prohibition on building materials.

18. The blockade in recent months has also meant a further deepening of Gazan impoverishment, which has increasingly been regarded by specialists, as virtually irreversible without a massive effort. As the ICRC report puts it, "the crisis has become so severe and entrenched that even if all crossings were to open tomorrow it would take years for the economy to recover".[7] Most recent figures place unemployment at over 44 per cent, dependence on food aid for subsistence at 80 per cent, decline of industrial output at 96 per cent, and poverty at over 70 per cent. Most emphasis in discussions of the blockade have been on import restrictions, but the prohibition placed upon exports also has had an undeniable crippling effect on the economy and well-being of the Gazan population, leading to the complete collapse of industrial and agricultural exports that had provided some material security for significant portions of the population and some hope for the future development of the Gaza Strip. It would be inadequate to return to the status quo prior to Operation Cast Lead. Only a complete termination of the blockade that allows imports and exports at May 2007 levels would be acceptable.

19. One perverse side-effect of the continuing blockade is to encourage Gazan reliance on tunnels into Egypt to obtain essential supplies, giving rise to black market activities and to severe safety hazards. It has been reported that in 2009 alone, 39 persons have died as a result of tunnel accidents, either from tunnel collapse or suffocation due to fuel leakages. As has been noted, "the tight siege imposed by the Israeli Occupation Forces (IOF) on the Gaza Strip [...] has driven the tunnel industry in Gaza, which has prospered in response to the sharp lack of essential goods".[9] If the crossings were open, the tunnels would likely disappear, or their role limited to efforts to smuggle arms and other illegal commodities. According to weapons specialists, Qassam rockets, predominantly used by Hamas in the attacks on Israel are locally made in Gaza, and thus there are no genuine security reasons for keeping the crossings closed. It would then become more feasible for

[8] See letter dated 23 July 2009 from the Palestinian Council of Human Rights, addressed to Mr. Carl Bildt, Foreign Minister of Sweden. Available from www.alhaq.org.

[9] See Al Mezan Center for Human Rights, press release No. 67/2009 of 28 July 2009.

Israel to monitor the tunnel traffic, to the extent it continued, for weapons smuggling.

20. The harmful impact of strict controls of mobility on family and social relations has been noted as part of the overall Gazan reality that ICRC graphically summarizes by the phrase applicable to the entire population of the Strip as "trapped in despair". A further dimension of this entrapment is the disallowance of hundreds of young people to seek education abroad,[10] including some cruel and dispiriting incidents involving Palestinians who have gained fellowship assistance from leading universities only to be refused exit permits by Israel in its role as occupying power.[11]

21. It needs to be noted once again, and repeated frequently, that the blockade as such is flagrantly and vindictively unlawful given the clear obligation of article 33 of the Fourth Geneva Convention to avoid collective punishment without exception. As such it constitutes a war crime of great magnitude. This denial of access to reconstruction materials appears to be an aggravated violation of article 33, especially severe given the physical and psychological vulnerability of the population in the aftermath of Operation Cast Lead.

22. Once again, the Free Gaza Movement sought to send a ship, *Spirit of Humanity*, containing humanitarian supplies to Gaza as a symbolic expression of the unwillingness on the part of peace activists to respect the unlawful blockade. Six prior ships had succeeded in landing in Gaza, although a prior boat, *Dignity*, had been rammed by an Israeli naval vessel in December 2008, and prevented from reaching Gaza. The announced purpose of this mission was to deliver needed supplies to Gaza, but also to expose the failures of the United Nations and of the intergovernmental community of States to implement international humanitarian law as obligated by articles 1 and 147 of the Fourth Geneva Convention, as well as article 86(1) of Protocol I.

23. As before, the ship was stopped and boarded in international waters, which constitutes an unlawful operation; the passengers were arrested for various periods up to several days, including former American congresswoman and Green Party presidential candidate, Cynthia McKinney. Despite the international site of the incident, 20 passengers were initially charged with "illegally entering Israeli waters" but were eventually released. The Free Gaza Movement vividly reinforces the impression that civil society takes international humanitarian law and international criminal law more seriously in this setting than do governments.

B. War crimes and accountability

24. There have been several important studies under respected auspices that confirm the earlier suspicions based on journalistic presentations and eye witness accounts of war crimes associated with Operation Cast Lead. These include (a) a comprehensive study prepared by a team of specialists in international humanitarian

[10] See Office for the Coordination of Humanitarian Affairs, *The Humanitarian Monitor*, June and July 2009.

[11] For confirmation of this role from the perspective of international law, see report of Amnesty International (note 3 above), rejecting Israel's claim that implementation of its 2005 "disengagement" plan ended its legal responsibilities as occupying power in Gaza.

law led by John Dugard, the former Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967, as an undertaking of the Arab League, under the title *Report of the Independent Fact-Finding Committee on Gaza: No Safe Place*, presented to the League on 30 April 2009; (b) the major report on war crimes by Amnesty International, published in July 2009, entitled *Israel/Gaza: Operation "Cast Lead": 22 Days of Death and Destruction*, several reports by Human Rights Watch;[12] and (c) the ICRC report entitled *Gaza: 1.5 Million People Trapped in Despair*, which is mainly confirmatory of the scale of devastation, and the aggravating impact of the Israeli refusal to lift the blockade. There is also a major report conducted by the United Nations Board of Inquiry relating to damage done to United Nations facilities and personnel as a result of Operation Cast Lead. A series of conclusions relating to Israeli responsibility and obligations were revealed in the executive summary of the full report; regrettably by order of the Secretary-General the full report has not been released, but its main conclusion is that Israel without sufficient military justification and with deliberate intention did serious harm to several United Nations facilities and caused major casualties on the part of those taking shelter in United Nations buildings and schools.

25. The reports of John Dugard, Amnesty International and Human Rights Watch achieve a high degree of reliability because their work product is convergent in two important respects: first, they adopt a balanced look at allegations of war crimes associated with the tactics relied on by Hamas, especially the firing of rockets into southern Israel and the accusations involving use of "human shields" by Hamas fighters, as well as a detailed consideration of allegations concerning Israeli tactics during Operation Cast Lead; and, secondly, they show an essential agreement on assessments of fact and law, leading to the overarching indictment of Israeli combat tactics as violative of international humanitarian law and thus engaging international criminal law. Such conclusions were further bolstered by the extraordinary testimony of 30 Israeli Defense Forces soldiers who took part in Operation Cast Lead, and received only perfunctory denials by the Government of Israel.[13] In addition, the reports also reached a subsidiary conclusion that Hamas tactics, although on a far more restricted basis, also constituted violations of the laws of war.

26. As indicated above, despite the overwhelming consensus associated with available materials relating to war crimes allegations directed at Israel and Hamas (as de facto governing authority in Gaza), the report of the fact-finding mission led by Judge Goldstone is awaited with great anticipation, and will likely address the same range of issues, but will include the evaluation of testimony received at a series of hearings with victims and other participants; members of this Human Rights Council mandated investigation were also denied entry to Gaza by way of Israel, and were forced to depend on the cooperation of the Egyptian Government to obtain access to Gaza; they received no requested cooperation from Israel. Its report is due in September 2009.

[12] "Rain of Fire: Israel's Unlawful Use of White Phosphorus in Gaza", 25 March 2009; "Precisely Wrong: Gaza Civilians Killed by Israeli Drone-Launched Missiles", 30 June 2009; "Rockets from Gaza: Harm to Civilians from Palestinian Armed Groups' Rocket Attacks", 6 August 2009; "White Flag Deaths: Killings of Palestinian Civilians during Operation Cast Lead", 13 August 2009 (available at www.hrw.org/en/publications/reports).

[13] See para. 29 below and note 14.

27. Whether in response to the incriminating testimony of Israeli soldiers or in anticipation of the report of Judge Goldstone, the Israeli Foreign Ministry announced on 30 July 2009 that it was going to investigate 100 complaints about Operation Cast Lead, including allegations concerning the use of phosphorus artillery shells. This is a welcome recognition by the Israeli Government that war crimes allegations are better acknowledged and investigated by Israel than dismissed out of hand. Although one continues to hope for an objective inquiry, Israel's formal announcement of the investigation was coupled with a detailed reassertion and comprehensive explanation of why Operation Cast Lead was a necessary and proportionate response to rocket attacks and suicide bombings over an eight year period, and that it was carried out with scrupulous regard for international humanitarian law.[14]

28. All of the above developments suggest that once the facts are established and recommendations received, attention will shift to the more difficult question of devising an appropriate mechanism for assessing accountability for war crimes. For political reasons, it is unlikely that such a mechanism will be established under United Nations auspices although the legal capacity to do so is definitely present, as it was illustrated by the establishment of ad hoc criminal tribunals for former Yugoslavia and Rwanda in the 1990s. The General Assembly also possesses the constitutional authority under Article 22 of the Charter of the United Nations to establish subsidiary organs as it deems necessary for the performance of its functions, and although it has never established a criminal tribunal, there is every reason to suppose that it possesses the authority to do so. Further, for jurisdictional, as well as political reasons, it is almost certain that the International Criminal Court is not available: Israel is not a party and would undoubtedly refuse all forms of cooperation. Palestine did not attempt to become party until after Operation Cast Lead and is not widely thought to have at present the legal credentials to qualify and be accepted as a "State". It is likely that the only available form of accountability will result from civil society initiatives associated with the imposition of sporting and cultural boycotts and divestment moves involving trade and investment. Once again it is anticipated that governments and the United Nations will not follow through at the implementation stage with respect to international legal obligations.

C. Breaking the silence

29. *Breaking the Silence: Operation Cast Lead*[15] is a publication containing the responses of combat soldiers who took part in the military operation. It has received considerable media attention because it confirms from within the Israeli Defense Forces several disturbing allegations: consistent Forces reliance on unacceptably loose rules of engagement that meant that international humanitarian law guidelines as to limits on military force in relation to civilians and civilian targets became virtually inoperative and were not part of briefings given prior to or during combat; widespread destruction of target that could not be justified from a military or

[14] See Reuters, "Israel says investigating 100 Gaza war complaints", 30 July 2009; for the full text of the report, see *The Operation in Gaza: Factual and Legal Aspects*, Israel Ministry of Foreign Affairs, 29 July 2009.

[15] Breaking the Silence is an organization of veteran Israeli soldiers that collects testimonies of soldiers who served in the occupied territories during the Second Intifadah. *Breaking the Silence: Operation Cast Lead* is available from www.breakingthesilenceorg.il.

security perspective; use of phosphorus in densely populated zones; interference with Gazan civilian movement to places of relative safety in Gaza by the fragmentation of the Strip trapping many within the worst combat sectors; racist pressures brought to bear on soldiers by what was described as the "military rabbinate", dehumanizing Arabs and Palestinians, and treating the conflict as a holy war against a demonic enemy.

30. It should be noted that the testimonies of these Israeli Defense Forces soldiers assumed greater credibility because they were not at all anti-Israeli or anti-Zionist in tone, and many of the soldiers accepted the underlying rationale of Operation Cast Lead as a necessary defensive reaction to Hamas rockets. Also there were some qualifications placed on the condemnation of disregard of the Forces for civilians: there was acknowledgement that Forces warnings were issued, that warning shots were sometimes fired to identify whether individuals were suspicious or to deter Gazans from coming closer to where soldiers were deployed, and that sporadic efforts were made by some Forces commanders to avoid doing as much civilian damage as could have been inflicted. Overall, an impression emerges from the testimonies that many of the tactics relied upon were less designed to kill and injure Palestinian civilians than to protect Israeli soldiers from injury, death, or capture. However, much of this increased the risks of harm inflicted to innocent Palestinians. A typical sentiment in the testimony was the following order given by a field commander to Defense Forces troops: "Not a hair will fall off a soldier of mine, and I am not willing to allow a soldier of mine to risk himself by hesitating. If you are not sure — shoot".[15] Or more generally: "There was a clear feeling, and this was repeated whenever others spoke to us, that no humanitarian consideration played any role in the army at present. The goal was to carry out an operation with the least possible casualties for the army, without its even asking itself what the price would be for the other side".[15]

31. The testimonies were anonymous, and it has been impossible up to this point to contact any of the soldiers for further clarification. At the same time, there is no indication that such testimonies lacked authenticity. Most commentary on Breaking the Silence stressed the Forces breakdown of respect for the Geneva Conventions and limits on war fighting embedded in the laws of war. Some observers also placed value on the report as a more trustworthy narrative than the official Israeli Defense Forces and Israeli response to war crimes allegations, which have consisted of blanket denials coupled with some acknowledgement that a few individual soldiers may have strayed from professional military standards of conduct under battlefield stress. The main Israeli response claimed that the Israeli Defense Forces as a whole took exceptional risks to accord moral and legal protection to the civilian population of Gaza over the course of Operation Cast Lead and acted in a proper professional manner under difficult combat conditions.

32. Even more important than this alternative picture of Israeli Defense Forces behaviour in relation to Operation Cast Lead and international humanitarian law was the whole question as to whether the use of modern military technology in the densely populated setting of the Gaza Strip could ever have conformed to the requirements of that law. One of the soldiers expresses this concern in the following language: "In urban warfare, anyone is your enemy. No innocents. It was simply urban warfare in every way".[15] Or "No accountability in such a zone whatever we do is fine ... 'sons of light' against 'sons of darkness'" and " ... the assumption is that everyone is a terrorist, and then it's legitimate to do anything we please".[15] In

this spirit, for instance, it was practice to treat any Gazan seen at a great distance with a cell phone as a terrorist. What comes across is that the context of combat in Operation Cast Lead on the ground was such that war crimes were indistinguishable from the logic of the military operation.

33. It is true that Hamas militants were capable of disguising themselves as civilians, that anyone could be a threat, and that it is normal for a military undertaking to minimize casualties to itself. The soldiers' testimonies indicate that the process of doing this produces grossly disproportionate harm by way of casualties to innocent civilians and devastation of the urban environment. In other words, the argument is less about the departure from international humanitarian law guidelines in the military operation than questions about the inherent disconnect between that law and urban warfare on such a scale, especially under conditions where the civilian population is denied the option of exit or shelter. Although, to be sure, there were specific departures, as in the case of using white phosphorus shells and bombs and tank flachette shells in areas with dense civilian populations. Such practices amount to indiscriminate attacks and would seem flagrant violations of article 35(2) of Protocol I additional to the Geneva Conventions of 12 August 1949 relating to the protection of victims of international conflicts: "It is prohibited to employ weapons, projectiles and materials and methods of warfare of a nature to cause superfluous injury or unnecessary suffering."[16]

34. At the very least, there is a burden of persuasion on those who have recourse to such a use of military power. According to Israel, such an operation was necessary to remove a major security threat. Here, one is struck by the relative absence on the part of Israeli commanders of any effort directed at removing the threat of future rocket attacks. As has been argued in a previous report, and mentioned above, diplomacy offered Israel a promising path to address the important security interest associated with diminishing or even eliminating rocket fired into southern Israel from across the Gaza border. The most that was told to the soldiers by their commanders was that Operation Cast Lead was somehow a response to the rockets or, more specifically, that "we're going in to create appropriate conditions for the negotiation to bring Gilad Shalit home".[15]

35. It is the judgment of the Special Rapporteur that Operation Cast Lead discloses that urban warfare, fought on the ground, from air or sea, cannot maintain the legal standards of constraints associated with international humanitarian law, more specifically with the special requirements of the Fourth Geneva Convention and Protocol I associated with the protection of civilian, particularly in circumstances of prolonged occupation. In this respect, the Israeli claim of adherence to the restraints of international law is unconvincing, as demonstrated by the evidence of combat practices and de facto rules of engagement; equally unconvincing are contentions that Israeli soldiers in the field should be the main concern of investigation and potential accountability. Instead, the focus should be upon high military commanders and political leaders who devised such an operation, as well as on the limits on military power in the first place.

36. One of the most celebrated legal guidelines on war fighting is contained in article 22 of the annex to the 1899 Hague Convention II on the Laws and Customs of War on Land: "The right of belligerents to adopt means of injuring the enemy is

[16] United Nations, *Treaty Series*, vol. 1125, No. 17512.

not unlimited." Article 35(1) of Protocol I expresses the same general sentiment: "In any armed conflict, the right of the Parties to the conflict to choose methods or means of warfare is not unlimited".[16] Urban warfare of the sort carried out in Gaza during Operation Cast Lead seems to exceed those limits; however vague they may seem to be as formulated in 1899, the time may have come in 2009 to give them concrete application to the circumstances of modern urban warfare. In other words, it is of great importance to focus on the war itself rather than to limit inquiry to the alleged unlawful practices and tactics.

III. Settlements in the Palestinian territories and their impact on the enjoyment of human rights

37. The Israeli settlements in occupied Palestine have recently received great attention as a result of President Barack Obama's widely publicized call for a "freeze" on settlement expansion as an essential step to revive negotiations looking towards a solution of the underlying conflict. President Obama has also asked Arab governments to reward Israel if it agrees to impose a freeze, implying that Israel would be taking a constructive political step for which it deserves to receive encouragement by way of reciprocity. So far the Israeli leader, Prime Minister Benjamin Netanyahu has agreed only to disallow the establishment of new settlements or an expansion of the land area under the control of existing settlements. However, he has insisted that the "natural growth" of West Bank settlements must be allowed, and further, that settlements in East Jerusalem will not be treated as part of any partial freeze. It should be observed that this controversy has been carried on without reference to Palestinian rights under international humanitarian law as if law is irrelevant, and the matter of the settlements is a purely political issue between the parties.

38. For this reason, it is important to recall what has been argued in several previous reports of the Special Rapporteur, that the settlements as such are unlawful under article 49(6) of the Fourth Geneva Convention that clearly states that "The Occupying Power shall not deport or transfer parts of its own civilian population into the territory its occupies".[17] This widely shared legal assessment was authoritatively confirmed by the International Court of Justice in the course of its advisory opinion of 9 July 2004 on the construction of a security wall: "Israeli settlements in Occupied Palestinian Territory, including East Jerusalem, are illegal and an obstacle to peace and to economic and social development ... [and] have been established in breach of international law."[1] At present, there are reported to be 121 settlements on the West Bank, 12 situated on land annexed after 1967 by the city of Jerusalem, and about 100 "outposts", which are physical presences established by the settler movement without receiving legal authorization from the Israeli Government.

39. From a legal perspective, acknowledging the relevance of Palestinian rights under law, any bilateral understandings between the United States and Israel, such as the Bush/Sharon exchange of official letters on 14 April 2004, assuring Israel that the large settlement blocs will be incorporated into the future borders of the Israeli State, are completely without legal value. The most important language in the letter

[17] United Nations, *Treaty Series*, vol. 75, No. 973.

of President Bush is the following: "In light of the new realities on the ground, including the existing major Israeli population centres, it is unrealistic to expect that the outcome of final status negotiations will be a full and complete return to the armistice lines of 1949 ... ". This is even more the case with respect to the effect of supposed informal understandings between the United States and Israel on natural growth of settlements despite the freeze commitments made formally in the Annapolis Declaration of December 2007. According to monitoring groups in actual fact, "tenders for new settlement building increased by 550 per cent from 2007. Actual settlement construction has increased by 30 per cent since the launching of the new round of peace talks. Settlement building around Jerusalem has increased by a factor of 38".[18]

40. It is an elementary principle of law and equity that any understanding between two parties cannot alter the legal rights of a third party. At most, such an understanding, even in the form of a contract, has only a bearing on the political expectations that exist between the two parties, in this case Israel and the United States. It is also true that within Israel itself the American call for a settlement freeze has aroused passionate forms of opposition, including the renewed efforts by the settler movement to establish in the West Bank settler "outposts" that are illegal even under Israeli law.[19] Rabbi Ovadia Yosef, spiritual leader of the ultra-orthodox Shas Party in Israel, a partner in the ruling coalition, has angrily repudiated the idea of a settlement freeze: "American insidiousness tells us to build here and not to build there as though we were slaves working for them."

41. In point of fact, Israel has throughout the entire period of the occupation expanded the population and territorial domain of the settlements: "In the two decades from 1972 to 1993, Israel increased the number of settlers in the West Bank, not including Jerusalem, from 800 to 110,600. In the following ten years — which roughly coincided with the Oslo peace process — the number increased at twice the rate, exceeding 234,000 in 2004. In East Jerusalem, the settler population jumped from 124,400 in 1992 to almost 176,000 in 2002."[20] The most recent estimates of settler population put the number in the West Bank at about 300,000, with an additional 200,000 in East Jerusalem.

42. Further settlement growth, quite apart from the freeze issue as it relates to a resumption of "peace" negotiations, is a continual encroachment on Palestinian rights of self-determination, as well as an overall violation of the basic obligation of the occupier under the Fourth Geneva Convention to protect the property and societal prospects of an occupied population. Therefore, during a period when the road map was supposed to curtail settlement growth, actual Israeli behaviour went in a quite opposite direction.

43. As summarized in the letter of Palestinian human rights organizations to the Swedish Foreign Minister, Carl Bildt: "The population growth rate of Israeli settlers in the occupied West Bank, including East Jerusalem, is 4.7 per cent, compared to an annual growth of the Jewish population in the State of Israel, which is 1.7 per cent.

[18] *Palestine Monitor*, "Israeli Settlements", updated 17 December 2008. Available from http://www.palestinemonitor.org/spip/spip.php?article 7.

[19] See Ethan Bronner, "West Bank Settlers Send Defiant Message to Obama" (*The New York Times*, 30 July 2009).

[20] See Ali Abunimah, *One Country: A Bold Proposal to End the Israeli-Palestinian Impasse* (Metropolitan Books, November 2006).

Thus, the smokescreen of 'natural growth' is used to mask continuing emigration of Jewish-Israeli settlers to the West Bank, as well as the creation of essentially new settlements appended to existing ones."[8] Some observers argue that these figures exaggerate the threat posed by this settlement growth, insisting that most of the growth is in haredin non-Zionist settlements, such as Modi'in Illit and Beitar Illit, currently with 45,000 residents who seem ready to move if given alternative housing within pre-1967 Israel as part of a solution to the underlying conflict.

44. Others question this flexibility, and the militant wing of the settler movement is adamantly opposed to any retreat from the present contours of the settlement phenomenon, and regard openly and deliberately the expansion of the settlements as the best insurance against the Palestinians ever establishing a sovereign State of their own, or at least a viable sovereign and independent State.

45. House demolitions unrelated to any security pretensions have been a major device in extending Israeli control over the West Bank in a manner that impairs Palestinian rights. As many as 277 homes were demolished in 2008 within the occupied Palestinian Territory, with East Jerusalem being most affected. Between January and July 2009, the Office for the Coordination of Humanitarian Affairs (OCHA) recorded the demolition of 221 Palestinian-owned houses, which displaced over 500 people.[21] These demolitions, besides being extraordinarily inhumane, impair Palestinian prospects for self-determination. A complementary technique relied upon in Jerusalem is the denial of building permits even to long-term Palestinian residents as part of a continuing effort to change the demographics of the city in Israel's favour.

46. The settlements also pose an additional problem for the maintenance of human rights and compliance with the Fourth Geneva Convention. The location of Israel's unlawful security wall has the effect of placing an estimated 385,000 settlers between the wall and the Green Line, while entrapping approximately 93,000 Palestinians on the Israeli side of the wall, sometimes cut off from their agricultural lands and parts of their villages, as well as from the West Bank generally.

47. There are several intertwined issues relevant to the mandate: (a) the settlements, and any further expansion, are a major unlawful impediment to the realization of the Palestinian right of self-determination; (b) if Israel accepts a freeze on unlawful settlement expansion it seems unreasonable for it to receive some kind of reciprocal gesture from the Arab governments, that is, should Israel be rewarded for doing what it was legally required to do in the first place; (c) agreements between Israel and the United States are legally irrelevant with respect to the settlements as only the Governments of Israel and the Palestinian Authority have the authority to determine their status in the context of peace negotiations; (d) Israel as occupying power has an underlying legal obligation to dismantle existing settlements, including those in East Jerusalem, and not interfere with Palestinian growth and development. This conclusion has also been reached by B'Tselem, the respected Israeli human rights organization, recommending a "humane" dismantling that respects settlers' human rights, including compensation for any loss.[22]

[21] See OCHA, "The Humanitarian Monitor", July 2009. Available from www.ochaopt.org.

[22] See "Land Expropriation and Settlements". Available from www.btselem.org/English/settlements.

IV. The wall and its legal implications

48. The date of 9 July 2009 marked the fifth anniversary of the Advisory Opinion of the International Court of Justice on the security wall, still being constructed mainly on the territory of the occupied West Bank, so designed as to be 86 per cent on West Bank territory. The wall was supposed to extend for 723 kilometres when finished, which is twice the length of building the wall along the Green Line and which would have saved Israel an estimated $1.7 billion of United States dollars. At present it is reported to be only about 60 per cent complete after a construction effort that has gone on for seven years, with latest reports indicating that construction has been suspended for budgetary reasons despite the claimed necessities of security. The Ministry of Defense and public opinion of Israel credit the wall with improved security within Israel; the significant reduction in terrorist incidents in recent years is invoked to confirm this claim. Critics, including the leadership of the Palestinian Authority, call for the dismantling of the wall, contending that it is a land grab unrelated to security that has caused great hardship to the Palestinians living near to or on the Western side of the wall, as well as being unlawful as located.

Israel's unlawful occupation: crisis of authority in international law

49. Despite the diversity among the 15 judges of the International Court of Justice, they voted 14 against 1 on the main issues of international law concluding: "... the construction of the wall being built by Israel, the occupying Power, in the Occupied Palestinian Territory ... [is] contrary to international law ... Israel is under an obligation to cease forthwith the works of construction ... to dismantle forthwith the structure therein situated ... to make reparation for all damage caused by the construction of the wall".[1] On 20 July 2004, the General Assembly at its tenth emergency special session voted overwhelmingly[23] to insist that Israel comply with the rulings of the International Court of Justice, and also called upon the General Assembly and the Security Council to consider what further action was required to end the illegal situation resulting from the construction of the wall. The Assembly in its resolution ES-10/15 also called upon all States Member of the United Nations to comply with their obligations as mentioned in the advisory opinion of the International Court of Justice, the United Nations highest legal body. Attention was particularly called to the obligation of States not to render aid or assistance in maintaining the situation created by such construction. Many subsequent resolutions adopted overwhelmingly by the General Assembly as well as the Human Rights Council have renewed the call on Israel to comply with its legal obligations, as mentioned in the advisory opinion.[24]

50. As is undisputed, Israel has rejected the findings of the International Court of Justice, indicating that it will only adhere to the rulings of its own national judicial system. It has done so, upholding a series of decisions by the Israeli Supreme Court that order the relocation of the wall so as to lessen the harmful impact on Palestinian

[23] A number of 150 Member States voted in favour, and six against (Australia, Micronesia, Israel, Marshall Islands, Palau, United States).

[24] See General Assembly resolution 63/97 (adopted on 5 December 2008 by a vote of 171 to 6, with 2 abstentions), para. 6; see also Human Rights Council resolution 10/18 (adopted on 26 March 2009 by 46 to 1, with no abstentions), para. 8.

communities. It is true that an advisory opinion of the Court is "non-binding" as a direct decision, but it represents an authoritative assessment of the relevant international law. Even though the findings are not directly binding, they present a definitive set of conclusions as to the requirements of international law under the circumstances. When the conclusions reached are so overwhelmingly supported, then there is no basis for "the law" to be inconclusive or contested. Such an assessment is strengthened here because the lone dissenting judge, from the United States, indicated in his Declaration that he accepted most of the legal analysis made by the majority. However, he felt that no firm conclusions could be reached without a better appreciation of the Israeli security arguments for locating the wall on the occupied territory.

51. As with the confirmed reports of war crimes, the non-implementation of the legal conclusions of the Court is extremely damaging to the authority of international law, of the Court, and of the United Nations generally. An unfortunate message has been delivered: the authority of the international community has been defied by a Member State of the United Nations, harm has been inflicted on a civilian population that is supposed to be under the protection of international law, and neither States nor the organs of the United Nations do anything about it. As with other aspects of the conflict, the failure to uphold Palestinian legal rights and the treatment of the Court both constitute a crisis of authority and reinforce for the Palestinians the idea that it is no help to have international law on its side.

52. Israel can defy with impunity its international legal obligations. The combination of an insistence that Palestinians renounce all forms of armed resistance and the failure to respect legal rights coupled with United Nations inaction in relation to this failure constitutes the current Palestinian dilemma. What is to be done by the Palestinians under such circumstances? Israeli columnist Gideon Levy explains the currently cynical Israeli approach to peace negotiations as an outgrowth of this situation: Israelis are not paying any price for the injustice of occupation. Life in Israel is just peachy. Cafes are bustling. Restaurants are packed. People are vacationing. Who wants to think about peace, negotiations, withdrawals — the "price" that might have to be paid. The summer of 2009 is wonderful. Why change anything?[25]

53. It should be noted that the issue of unlawfulness arises almost exclusively as a result of building the wall on the occupied Palestinian Territory. If the wall had been built along the Green Line or inside pre-1967 Israel, it might have generated moral and political criticisms associated with such a coercive and hostile form of separation, but not legal objections. The Berlin Wall was not challenged legally, but it was symbolic of what was wrong about East Germany and the Soviet approach to world order. If the Soviet Union had dared to build the wall even a few feet on the West Berlin side of the dividing boundary it could have well provided the trigger of World War III. It is notable that current American fence-building along the Mexican border, while controversial, is scrupulously respectful of Mexican territorial sovereignty. If a State or political community is not as powerless as Palestine, law and respect for territorial rights are generally respected.

[25] See Jerrold Kessel and Pierre Klochendler, "Mideast: Building Peace on an Incomplete Wall" (Inter Press Service, 27 July 2009).

54. Palestinian protests against the wall continue in several sites in the West Bank, most notably weekly demonstrations near the towns of Bil'in and Ni'ilin. Israel has responded with rubber bullets, tear gas, and arrests, with several deaths and many injuries resulting. It would appear that Israeli security forces have been using excessive force in violation of their basic duties under international humanitarian law as the occupying Power.

V. Recommendations

55. **The following recommendations drawn from the body of the report are emphasized as matters of urgency:**

(a) **The General Assembly should request an advisory opinion from the International Court of Justice on the obligations and duties of Members States of the United Nations to cooperate with the Organization and its representatives;**

(b) **Members States should be encouraged to use national means, including courts, to fulfil their obligations under the Fourth Geneva Convention, articles 146 to 149, with respect to implementing international criminal law as pertains to the occupied Palestinian Territory;**

(c) **Israeli respect for international law and Palestinian rights should henceforth be an integral element in future peace negotiations;**

(d) **Consideration should be given to imposing limits on the supply of arms to the parties to the Israel/Palestine conflict;**

(e) **The unlawfulness of Israeli settlements should be confirmed, and steps taken to move beyond the freeze, and in the direction of dismantling, with due respect for the human rights of all affected;**

(f) **Consideration should be given to requesting the International Committee of the Red Cross or some other designated body to study and make recommendations as to the special problems arising from prolonged occupation.**